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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 479

LEHIGH VALLEY COÖPERATIVE FARMERS, INC.,

and

SUNCREST FARMS, INC.,

Petitioners

v.

UNITED STATES OF AMERICA, and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA, and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Lehigh Valley Cooperative Farmers, Inc. and Suncrest Farms, Inc., pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered on February 20, 1961 at Nos. 13,289, 13,290 and 13,291 below. These cases were consolidated by the District Court and the Court below. Rehearing denied March 10, 1961.

Opinions Below

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 183 F. Supp. 80 (1960). The opinion of the United States Court of Appeals for the Third Circuit is printed in the Appendix hereto, page 32, and as yet is unreported.

Jurisdiction

The judgments of the United States Court of Appeals for the Third Circuit were entered February 20, 1961. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Questions Presented

These proceedings are brought under the Agricultural Adjustment Act of 1933, as amended by the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. 601, *et seq.* It was declared in these Acts to be the policy of Congress, through the powers conferred upon the Secretary of Agriculture, "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices . . .". By the authority of the Act, the Secretary of Agriculture has established marketing orders to regulate the handling of milk and milk products in various marketing areas throughout the country. The issues in the present case arise out of certain provisions included by the Secretary in Order No. 27, the Milk Marketing Order in effect in the New York-New Jersey Milk Marketing Area. Under the Order, pool plants are fully regulated by the Order and must comply with the various shipping and sales requirements of the Order. A pool handler is one who operates such a plant. Any other plant or any other handler is considered non-pool. The questions presented are:

1. Does Section 8c(5), and particularly subsection 8c(5)(A) of the Agricultural Marketing Agreement

Act of 1937, as amended, which requires that "such prices shall be uniform as to all handlers * * *", permit the Secretary to impose on handlers operating non-pool plants, compensatory payments which, when added to the actual prices paid by such handlers to dairy farmers or producers for the milk, result in a substantially higher price than is required to be paid by handlers operating pool plants under Federal Order No. 27?

2. Does subsection 8c(7)(D), which authorizes provisions "incidental to," "not inconsistent with" and "necessary" and which this Court has said "* * * gives opportunity only to include provisions auxiliary to those definitely stated", permit the imposition of such compensatory payments?

3. Does subsection 8c(5)(G), which provides that a Federal Order applicable to milk and its products shall not prohibit the flow of milk from any production area into a marketing area, permit provisions imposing such compensatory payments when the effect of such provisions is, in fact, to prohibit the entry into the marketing area of outside milk?

4. If subsection 8c(7)(D) does permit the imposition of such compensatory payments, without regard to the "terms and conditions specified in subsection 8c(5)(A)", is it an illegal delegation of legislative authority in that no standards are set and no course charted which the Secretary must comply with or follow?

5. Are the words "producers" and handlers" as used in subsection 8c(5)(A) limited to mean only "pool handlers" and "producers shipping to pool plants", even though those terms were not used by the Secretary until much after the enactment of the statute, and in light of the fact that the Secretary in Order No. 27 defines "handlers" to include both non-pool and pool handlers?

6. If the meaning of the words "producers" and "handlers" is to be so limited, as held by the Court below, does the statute, then, in any section whatsoever authorize the Secretary to regulate non-pool handlers and dairy farmers in any respect?

7. Can it be said that handlers who have served a segment of the present marketing area over a long

period of years before the expansion of the marketing area, caused a loss of sales to producers who ship to pool handlers?

Statutes and Orders Involved

The statute involved is the Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, 50 Stat. 246, 7 U. S. C. § 601 *et seq.* Provisions essential to this case are set forth in the Appendix hereto, page 23.

The administrative order involved herein is Order No. 27, as amended, regulating the handling of milk in the New York-New Jersey Milk Marketing Area. The amendments under attack were issued by the Secretary of Agriculture of the United States, to become effective August 1, 1957 (7 C.F.R., Section 927.1 *et seq.*, 1957). The particular provisions directly involved in this case are Sections 927.5, 927.6, 927.7, 927.83 and 927.84. These are the pertinent provisions of Federal Order No. 27 and appear in the Appendix hereto, page 26.

Statement of the Case

Petitioners Lehigh Valley Cooperative Farmers, Inc. and Suncrest Farms, Inc. are processors and distributors of milk whose plants are located respectively in Allentown and Bethlehem, Pennsylvania. Petitioners have distributed fluid milk into northern New Jersey, in and around the city of Phillipsburg, for twenty-five years and fifteen years, respectively. They are milk "handlers" as that term is defined by section 927.7 of Federal Milk Marketing Order No. 27, 7 C.F.R. 927.7, and as used in section 8c(5)(A) of the Agricultural Marketing Agreement Act. Amendments to Order No. 27, effective August 1, 1957, extended the marketing area of the Order to include northern New Jersey as well as some parts of upstate New York. Since the date of these amendments, the Order has been known as the New York-New Jersey Milk Marketing Order.

On August 1, 1957, the earliest date such action could be taken, Petitioners instituted proceedings for administra-

tive review, *inter alia*, of Sections 927.83 and 927.84 of the Order. The proceedings were filed pursuant to the administrative remedy provided by Section (15)(A) of the Agricultural Marketing Agreement Act. The disputed sections would require Petitioners to make "compensatory payments", or "penalty" payments, computed as the difference between Class I-A (highest class price) and Class III (lowest class price) prices, for the privilege of serving their customers in the Phillipsburg, New Jersey area. These payments were to be made to the Producer Settlement Fund for distribution to other producers.

An independent Hearing Examiner, expert in Marketing orders, after full hearing and consideration of the facts and law involved, filed his Recommended Report invalidating the compensatory payment provisions. Exceptions to the Report were filed by the Secretary of Agriculture, and following argument before the Secretary's Judicial Officer, the questioned provisions were ruled valid and lawful.

Petitioners appealed to the United States District Court for the Eastern District of Pennsylvania, pursuant to the judicial remedy provided by Section (15)(B) of the Act. The cause was argued before Judge Clary of that Court. Subsequently Judge Clary wrote an Opinion and Order, declaring that Sections 927.83 and 927.84 violate the uniformity clause of Section 8c(5)(A) of the Act. As found by the Hearing Examiner in his Recommended Report, which finding was not overruled by the Judicial Officer, the District Court determined that milk for fluid usage could not be purchased in this area at the Class III price and the price which, when added to the compensatory payment required of them constituted an acquisition cost to the Petitioners consistently and substantially higher than the costs of their competitors for milk sold into the marketing area. It was not contended by the Government at any stage of these proceedings that the cost to Petitioners for milk sold in the marketing area was uniform or substantially equal to that of their competitors fully regulated by Order No. 27.

During the pendency of the (15)(A) proceeding, the Sec-

retary of Agriculture moved against Petitioners in an enforcement action to compel their compliance with the Order pending the ultimate administrative and judicial determination of the (15)(A) and (15)(B) proceedings. Judge Clary's injunctive order requires Petitioners to file reports with the Market Administrator of Order No. 27, and as suggested by Petitioners to the District Court, to pay compensatory payments into the Registry of the District Court. Accordingly, all such payments have been and are currently being made into the Registry of the Court. Petitioner Lehigh Valley Cooperative Farms, Inc. has paid into the Registry of the Court to date $577,749.48; Petitioner Suncrest Farms, Inc., $99,862.73.

Subsequent to September 1, 1958, because of a ministerial change in the wording of the Order to become effective September 1, 1958, the Government petitioned the District Court to amend its former Order. The petition was denied.

The Secretary of Agriculture appealed the decision of the District Court to the United States Court of Appeals for the Third Circuit. The case was argued and the decision of that Court written by Judge McLaughlin, as of February 20, 1961, reversed the District Court. Petitioners filed an application for a Re-hearing, which was denied by the Circuit Court on March 10, 1961. The Circuit Court in no way disturbed the Findings of Fact of the Hearing Examiner or the District Court. The posture of this case, as presented to this Court, is that your Petitioners, under the Order and under the decision of the Circuit Court, are required to pay prices for milk substantially in excess of those required of their fully regulated competitors.

Reasons for Granting the Writ

I. The Decision of the Court Below Conflicts With the Applicable Decision of the Court of Appeals for the Second Circuit.

The decision of the Court below is in direct and total conflict with the Decision of the Second Circuit in the case

of *Kass v. Brannan*, 196 F. 2d 791, cert. denied 344 U. S. 891. The questions in this case are precisely the same as in the *Kass* case, except the Third Circuit found that the instant case presented a stronger case for uniformity, if uniformity was required, than did the *Kass* case. See footnote 5 of the Opinion of the Court below, Appendix, page 38. In both cases, the same words of the same sections of the statute are involved. The provisions of Federal Order No. 27 in both cases were substantially the same, although designated by different numbers. The provisions requiring compensatory payments in the instant case will be found in our Appendix, page 26. The District Court held that the provisions were substantially the same.[1] The Third Circuit in no way differed with the District Court in this regard.

The Second Circuit, in the *Kass* case, held that "uniformity", as that word is used in Section 8c(5)(A) of the statute involved, prohibited a provision requiring non-pool handlers to pay more for milk of the same use than pool handlers. It further held that Section (7) (D) could not fur-

[1] In answer to a query of the District Court, counsel for the Secretary stated that the difference in the compensatory payment provisions of Federal Order No. 27 as they exist under the *Kass* case and under the instant case, was merely to this effect: that in the *Kass* case, if the Administrator determined that there was an inadequate supply of "cream or condensed milk" the compensatory payments would not be required for a period of time. In the instant case, the compensatory payment provision provides that if Class III milk is less than 15% of the combined Class I-A and Class II, the compensatory payment provision will not apply; location differentials are provided for in the instant case; and it established a different compensatory payment provision for milk beyond the 425 mile zone. These changes are not basic, but merely incidental and in no way change the basic principal of law here involved. *The District Court did not find that these changes were of sufficient importance to change the law as announced in the Kass case. The Court below did not deal with these changes at all, but flaty held that the Kass case was wrong. Implicit in both decisions is the fact that neither Court found any distinguishing features of substance between the two compensatory payment provisions.*

nish such authority since such a requirement would be inconsistent with the "terms and conditions" spelled out in Section 8c(5)(A). Appendix, page 23. The Court below, after paraphrasing the Circuit Court's decision in the *Kass* case, said: "We cannot agree with the holding." Appendix, page 36. In the Second Circuit, Judge Swan wrote the Opinion, Judge Augustus Hand concurred. A dissenting Opinion was written by Judge Learned Hand. It is noteworthy that in the dissent, after discussing one method of obtaining uniformity which Judge Learned Hand discarded as not being practicable, he then turned to the provisions of Order No. 27 establishing compensatory payments, which are virtually the same provisions that appear in the instant case, and stated regarding uniformity: "The provisions in suit were promulgated to effect this purpose; and I shall assume that they can be defended only on that ground * * *."

The court below did not follow the reasoning of either the majority opinion or the minority opinion, but squarely disagreed with the decision in the *Kass* case.

The basic factual premise common to both the instant case and the *Kass* case is that Petitioners, like Kass, paid more (initial cost plus compensatory payments) than pool handlers for milk of the same use sold in the marketing area. This was a substantial amount. The fact of such higher cost to Petitioners was found by the Hearing Examiner in his Report, and not overruled in this respect by the Judicial Officer. The District Court in its Opinion made a like finding. No contrary finding was made at any stage of these proceedings; the Government never contested such finding.[2] The corresponding disparity of costs to handlers

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[2] The District Court said: "The government cannot argue, (nor has it attempted to argue that the total cost to the plaintiffs of the liquid milk which they sell in Northern New Jersey is equal to the cost to its competitors. There is uncontroverted evidence to prove that the cost of raw milk to the plaintiffs is substantially higher than the Order No. 27 uniform Class III price classification, so that the

present in the *Kass* case was somewhat less. The Court below is in conflict with the *Kass* case in its opposite holding on the same fundamental facts.

The undisputed facts of the (15)(A) proceeding showed that the Pennsylvania Milk Control Commission by authority of the Pennsylvania Milk Control Law, Act of April 28, 1937, P. L. 417, fixed a price for milk purchased in Pennsylvania and sold out-of-state, including the area here involved, at a substantially higher price than would have been required under Federal Order No. 27.[3] *Milk Control Board of the Commonwealth of Pennsylvania v. Eisenberg Farm Products,* 306 U. S. 346, 352-353.

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total cost to the plaintiff handlers (when we include the compensatory payment based upon the difference between the uniform Class I and Class III price) will be in excess of the cost to fully regulated pool plant handlers. This is exactly what Judge Swan said § 608c (5)(A) of the Agricultural Marketing Agreement Act prohibited. *Kass v. Brannan, supra.*"

[3] At pages 59 and 60 of the (15)(A) hearing record of the Suncrest case, Petitioner stated the facts clearly, as follows:

> ". . . For the month of August, Mr. Daniels, the price would have been, adding the 'compensatory' payments on top of the Class I price that we are obligated to pay under the Pennsylvania Milk Control Commission rulings, would amount to $8.85 a hundredweight, or bringing it down more specific, to 5¾ cents a quart more than our competitors who might be operating under the New York pool . . . 'compensatory' payment for the month of August amounted to $2.65.
>
> "Daniels: That being the difference between the Class I-A and the Class III price?
>
> "Yohonic: In the month of September the price was increased in the Pennsylvania regulations to $6.40. 'The compensatory' payments were $2.78 plus, bringing it to a total of $9.18 a hundredweight. The Class I price under Order 27 at that time was $5.83.
>
> "Daniels: How much . . .?
>
> "Yohonic: . . . six cents . . . It is obvious that it is impossible to continue . . . business when you must pay such a tribute in order to cross the river and do business in an area that you have been doing business for 10 years, in our instance, and as much as 30 years in some other instances."

The acquisition cost of milk to Lehigh Valley Cooperative Farmers during the year considered in the promulgation record was likewise substantially higher than it would have been required to pay under Federal Order No. 27. See page 309a of the printed record.

Adding the compensatory payments to the costs as found by the Hearing Examiner and the District Court or to the Pennsylvania Milk Control Commission price would take the cost to Petitioners so high that it would be impossible to remain in the market that they have historically served for 15 years in the case of Sunerest and 25-30 years in the case of Lehigh Valley. The Third Circuit held the required excess payments valid. This presents a very serious conflict with the doctrine of the *Kass* case. The part of the marketing area which Petitioners have served over this period of time is part of the metropolitan and commercial area of Allentown, Bethlehem and Easton, Pennsylvania, and Phillipsburg, New Jersey. Phillipsburg lies just across a short bridge joining it with Easton.

The Court below rests its decision on subsection (7)(D) of the statute. The *Kass* decision followed the case of *United States v. Rock Royal Co-Op.*, 307 U. S. 533. This is the leading case in the field of Federal Milk Marketing Orders issued pursuant to the statute here involved. This Court, in that case, held that subsection (7)(D) was merely auxiliary and must conform to the standards definitively set out.[4]

This Court again, in the case of *Brannan v. Stark*, 342 U. S. 451, had occasion to deal with the sections of the statute here involved, and the reasoning in that case was the same as this Court announced in the *Rock Royal* case. It was held by this Court that the Secretary cannot find au-

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[4] At pages 575 and 576, the Court said: "The terms of orders are *limited to the specified provisions minutely set out in sections 8c(5) and (7)*. While considerable flexibility is provided by Section 8c(7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified." (Emphasis added.)

thority for any substantial and basic provisions under subsection (7)(D).[5] The Second Circuit, in the same case, 185 F. 2d 871, announced the same principles.[6]

This Court, in the *Rock Royal* case, *supra*, noted that Congress fashioned this statute in more detail than the National Industrial Recovery Act. The Congress, following the decision in the case of *Schechter et al. v. United States*, 295 U. S. 495, in amending the Agricultural Marketing

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[5] "Section 8c(7) authorizes a congeries of general terms which may be included in all marketing orders, including those dealing with commodities other than milk and milk products. The Secretary claims authority for the provisions in question is given by the last paragraph of this omnibus subsection, a paragraph authorizing the inclusion of auxiliary provisions 'incidental to • • • the terms and conditions specified in subsections (5), (6) and (7)'. Yet it is claimed that the contested provisions are of such basic importance that their validity may be crucial to the success of the whole milk marketing program. We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tail pipe." *Brannan v. Stark*, 342 U.S. 451, 462.

[6] "Whether the power to provide this payment to cooperatives is 'incidental' depends, of course, upon the meaning of that word as used here. The definition given in decisions has varied according to the situation and the statute or instrument to be construed (20 Words and Phrases, pp. 418-434). Probably as good a definition as any, in our situation, is 'Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted' (*First National Bank v. State of Missouri, etc.*, 263 U.S. 640, 659, 44 S. Ct. 213, 216, 68 L. Ed. 486). By such definition, this payment is not authorized to carry into effect the powers granted the Secretary under the Act but is opposed to the express requirement of uniform prices to producers subject only to the deductions and differentials set out in the Act.

"That this payment is not 'not inconsistent' is determined by what has last been above stated." *Brannan v. Stark*, 185 F2d 871, 882.

Agreement Act, stated through Senate Report No. 1011, that the Act was being amended to conform to the principles set out in the *Schechter* case.[7]

The decision of the Court below in the instant case is not only squarely in conflict with the decision of the Second Circuit in the *Kass* case, but is in conflict with the decisions of this Court in *Rock Royal* and *Brannan v. Stark, supra.*

An analysis of the specific terms permitted to be included in a milk order set forth in Section 8c(5) will disclose none to which the contested compensatory payment provisions can be auxiliary. In fact, the disputed provisions are in direct conflict with the uniformity class price requirement set forth therein.

A provision to be valid under Section 8c(7)(D) must be both incidental to and *not inconsistent* with the major terms specified in Section 8c(5), and it was for the breach of this basic requirement that the Court in the *Kass* case refused to validate the contested provisions since they, in fact, violated the uniformity provision set forth in Section 8c(5).

Nor do the disputed order provisions comply with the conjunctive "necessary" clause of Section 8c(7)(D). The record shows that the price of milk available to non-pool handlers in this area is higher than the New York Order blend price. Consequently, the rate of compensatory payment set forth in the contested provision is much in excess of that which would be "necessary" to equalize the milk costs of pool handlers and non-pool handlers.

It is, therefore, apparent that the provisions here under

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[7] "To eliminate questions of improper delegation of legislative authority raised by the decision in *Schechter et al. v. United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing and terminating orders, and specify the terms which may be included in orders dealing with the enumerated commodities." 74th Cong. 1st Sess., May 3, 1935, Cal. Day July 13.

attack derive no validity from Section 8c(7)(D) of the Act.[8]

The decision of the Court below conflicts with the *Kass* decision in another substantial regard. The Second Circuit interprets the word "producers" as used in Section 8c(5)(A) to include any and all dairy farmers who supply milk, and makes no distinction between producers who ship to a pool plant and those who ship to a non-pool plant.[9] The Second Circuit likewise made no distinction between pool handlers and non-pool handlers, but treated the word "handlers" as used in Section 8c(5)(A) as including all handlers. There is no distinction in the statute between pool and non-pool handlers. The requirement is that the class prices fixed shall be uniform as to *all* handlers. In fact, the Secretary, in Order No. 27, Section 927.7, defines "handler" to include both pool and non-pool handlers. Appendix, page 26. It will be seen from this definition that your Petitioners are handlers, not only as that term is used in Section 8c(5)(A) of the statute involved, but also by the very definition of the Secretary in the Order here involved. Even the Secretary recognized the intent of Congress to use the word handler to include both pool and non-pool handlers. The Secretary, in Section 927.6, defined "producer" in a more limited way, stating that he is a dairy farmer whose milk was delivered to a pool plant. Appendix, page 26. With this definition the Second Circuit, as heretofore pointed out, did not agree. The Secretary defined, in Section 927.5, a dairy farmer as one who produces milk. Appendix, page 26.

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[8] Judge Clary of the District Court said in his Opinion:

"The plaintiffs, as already pointed out, take the position that since compensatory payments are in fact inconsistent with section 608c(5)(A) of the Act, they are not authorized by section 608c (7)(D). With this we agree. *Kass v. Brannan*, supra. . . ."

[9] In the *Kass* case, at page 795, the Court said: "• • • the Act itself does not define 'producers' but it is clear from the context that the term refers to dairy farmers who supply the milk which the handlers market".

The Second Circuit likewise did not agree with this distinction.

The Court below in the instant case concluded in speaking of Section 8c(5)(A) that "* * * its only valid construction is *that its application is limited to all pool or fully* regulated handlers * * *". Appendix, page 40.

Since the Order which the Court below sustained provides that only dairy farmers shipping to a pool plant are "producers", the others being merely "dairy farmers" who produce milk, we then have another sharp conflict between the instant case and the *Kass* case. The conclusion of the Court below that the Act demonstrates a legislative intent to distinguish between *pool* handlers and *non-pool* handlers, when the word "handlers" is used, is manifestly impossible inasmuch as the concept of *pool* and *non-pool* handlers postdates the passage of the Act by a considerable period, and was supplied by the Secretary of Agriculture and his subordinates. If the Opinion of the Court below is to prevail, then the word "handlers" appearing in Section 8c(5)(A) is synonymous with the words "pool handlers". In that event, and on this premise, a non-pool handler is not subject to any type of regulation, inasmuch as the statute would then not deal with non-pool handlers. It is obvious from the reading of the statute that Congress meant the word "handlers" to cover all types of handlers. This conflict concerns the fundamental question of whether delegation of power to the Secretary of Agriculture under the Act of 1937, as amended, depends upon the intent of Congress as expressed in said Act, or whether it depends upon the views of the Secretary as to the desirability of his action. The Court in the *Kass* case, and this Court in the cases of *Rock Royal* and *Brannan v. Stark, supra*, searched for and determined that which Congress intended. The Court below in the instant cases seemed to be more persuaded by the desires of the Secretary.

In the case of *Stark v. Wickard*, 321 U. S. 288, at page 289, this Court speaks of "farmers producing milk" or "dairy

farmers" as producers. When the case again came before this Court in the case of *Brannan v. Stark, supra*, involving the very same litigants, at page 453, this Court again in speaking of the moving parties, used the words "producers", "farmers" and "dairy farmers" interchangably.

In the *Rock Royal* case, *supra*, at pages 543-546, where this Court quotes Sections 1 and 2 of the statute here involved, it spoke of farmers by using the term "producers" even though the statute in those sections used the word "farmers". It is evident that Congress made no distinction between dairy farmers who ship milk either to pool or non-pool handlers. The Opinion of the Court below, if correct, would exclude from the operation of the statute all non-pool handlers and all producers who ship to or supply non-pool handlers. That being so, the Secretary could exercise no regulation, control or supervision over them. Your Petitioners do not claim such an exclusion. They do contend, however, that such regulations as may be promulgated by the Secretary of Agriculture shall be uniform as to prices and costs. The *Kass* case so held; the Court below flatly disagreed. The Court below, as previously stated, has decided a Federal question of statutory interpretation in a way which conflicts with the applicable decisions of the cases heretofore cited.

The decision of the Court below in the instant case converts the auxiliary provision, subsection (7)(D), into a basic provision. This is contrary to the *Kass* decision which held that the compensatory payment provision was "inconsistent with the terms and conditions specified in Section 8c(5)(A) and, therefore, cannot be justified under Section 8c(7)(D)". There the Court recognized that Section 8c(7)(D) was purely auxiliary, as this Court held in the cases of *Rock Royal* and *Brannan v. Stark, supra*. The imposition of a compensatory payment is the exercise of a very substantial and real power. Under the decision of the Court below, the Secretary could impose compensatory payments at such a level, as actually done in the instant case, to drive all non-

pool handlers completely out of a market, even though they had been there for many years, and even though the prices paid by them for the milk sold in the area in the same use classification were substantially higher than required of pool handlers by Order No. 27. This was characterized by the Court in the *Kass* case as imposition of penalties. If the Secretary can use subsection (7)(D) for this very basic purpose of fixing prices, there are no standards and no course is charted which he must follow. The action of the Secretary, if the Court below is correct, amounts to preemption of the market for the pool handlers and pool producers, and away from non-pool handlers and their producers, even though the non-pool handler has no competitive price advantage. The Court, in the *Kass* case, recognized that compensatory payment provisions are part of the "minimum price" fixed by the Secretary, as that phrase is used in Section 8c(5)(A).

The decision of the Court below conflicts with the holdings of this Court, to the effect that basic questions of statutory delegation of power must be resolved before reliance on findings of necessity made by an administrative agency. If statutory authority is lacking, the administrative agency should present the matter to Congress.[10] See *Regents of University System of Georgia v. Carroll*, 338 U. S. 586, 600; *Addison v. Holly Hill Fruit Products*, 332 U. S. 607; *F. C. C. v. American Broadcasting Co.*, 347 U. S. 284.

We turn now to the question of administrative difficulties. This question was passed upon also in the *Kass* case. It was

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[10] In *Federal Power Commission v. Panhandle Eastern Pipeline Co.*, 337 U. S. 498, at pages 515, 516, the Court said: "If the Commission is of the opinion that it should have power to control the disposition of leases by natural-gas companies, it is authorized to call the attention of Congress to that fact."

In the case of *Denver Union Stock Yard v. Producers L. M. Association*, 356 U. S. 282, the Court said: ". . . If the Act does not fit the present economics of the business, a problem is presented for the Congress." . . .

held in the *Kass* case that there was no evidence of administrative inconvenience in determining what was actually paid by the non-pool handler upon whom the compensatory payment was impressed. The Court held that if there had been such a showing, a slight disparity might be justified, but in the case where no administrative inconvenience was shown, "• • • any discrimination in price is contrary to the requirement of uniformity". In the instant case, there is no evidence of inconvenience or difficulty whatsoever in determining what was paid by your Petitioners to the "dairy farmers" or "producers" who supplied them with milk. In compliance with the order of the District Court, your Petitioners file monthly reports with the Market Administrator, setting forth the amount of milk received by them, and the disposition of such milk both as to where sold and its use classification. They also file with the Pennsylvania Milk Control Commission monthly reports setting forth the same information. The Administrator of Order No. 27 and the Pennsylvania Milk Control Commission audit the records of your Petitioners periodically in order to verify the reports. It can be easily determined during these audits what the actual payments were to those supplying milk. Hence, under the *Kass* decision, no discrimination whatsoever can be justified, but under the decision of the Court below in the instant case, there is no restraint on the amount of discrimination that can exist by virtue of the Order.

The Court below did not in any regard attempt to distinguish the instant case and the *Kass* case. It definitely and flatly disagreed with the reasoning of the decision in the *Kass* case in every regard. Had it been a Court of superior jurisdiction, the Second Circuit would have been overruled.

II. The Case Involves a Substantial Federal Question of General Importance.

The United States Secretary of Agriculture has promulgated, and there now exist, seventy nine (79) Federal

Orders throughout the United States, many of which contain various compensatory payment provisions. Twenty-six of these Orders recognize that what the non-pool handler pays for milk must be taken into consideration when fixing the amount of compensatory payments required to be paid. Twenty-one of these Orders have compensatory payment provisions similar to the ones here in question. The District Court for Southern Connecticut has held that compensatory payment provisions of Federal Order No. 96, which are similar to the ones here in question, are invalid, while the District Court for Northern Ohio, Eastern Division has found the compensatory payment provisions of Order No. 75, which are similar to the ones here in question, valid. This poses an unsettled question. Until the decision of the Court below held the contested provisions valid in the instant case, the only opinion of an Appellate Court was in the *Kass* case, which held such provisions of the Order invalid.

The 84th Congress, 1st Session, had the statute under consideration. This consideration by Congress was subsequent to the *Kass* decision, and it must be assumed that Congress was cognizant of the interpretation placed upon Section 8c(5)(A) and Section 8c(7)(D) by the Court of Appeals for the Second Circuit in the *Kass* case. By inaction after a hearing before the subcommittee on dairy products, it should be taken as an acknowledgment that the Court in the *Kass* case correctly interpreted the meaning and intent of Congress.

The holding of the Court below is contrary to the general understanding of the purpose of compensatory payments as previously recognized by the Secretary and university authorities.

In the *Kass* Opinion, the Court quotes a Mr. Weldon, a well recognized authority on milk, who appeared as a witness, who said: "* * * to insure that the minimum cost (of non-pool milk, cream, etc.) to handlers is the same as the

regular class price to handlers of milk received at pool plants * * *". In the instant case, there was testimony by Dr. Leland Spencer, Professor of Agricultural Economics, Cornell University, also a well recognized authority in the field of milk marketing and milk regulations, who testified to the same effect as Mr. Weldon. Dr. Spencer recognized the necessity of uniformity and lack of discrimination; he said: "I certainly would not like to see any unnecessary hardship created for any handler or producer. My only concern is that there be established by some proper means an equality of opportunity between those in the pool and under the regulation and those who are not. * * *" This witness was not called by your Petitioners. He also testified that with the Pennsylvania Milk Control Commission functioning as it is, any administrative difficulties would be "helped a lot" from an administrative point of view. Dr. C. W. Pierce, of Pennsylvania State University, likewise recognized as an expert in this field, and not called by your Petitioners, in speaking of uniformity, said: "The purpose, Mr. Daniels, as I see compensatory payments, is to equalize the cost to handlers on milk that is regulated by the order and priced by the order, and comes from order plants, to equalize the cost on milk from other sources that comes into the marketing area for similar uses, particularly Class I." In answer to a question as to whether compensatory payments should have the function of guaranteeing to any group of producers the Class I market, Dr. Pierce said: "No. The compensatory payment that I suggested, that we have suggested, is not for the purpose of keeping milk out of the market. * * *"

It is perfectly apparent that no one advanced the theory that uniformity was not required as between pool and non-pool handlers. In fact, the Judicial Officer for the Secretary of Agriculture, in former cases, based his decisions on "equalized costs", and subsequent to the decisions in the instant case he did likewise. However, as to your Peti-

tioners, he departed from that theory. The Court below in the instant case, in contrast to what was done in the *Kass* case, ignored the testimony of Dr. Spencer and Dr. Pierce. The Court likewise ignored the fact that in twenty-six Federal Orders, the Secretary in fixing compensatory payments gives effect to what was actually paid for the milk by non-pool handlers. These include markets as large as Upstate Michigan and Lower State Michigan, including the city of Detroit.

It has been previously pointed out that the prices required of non-pool handlers, substantially in excess of what pool handlers are required to pay for milk of the same use and sold in the marketing area, preempt the market to the producers of the pool handlers and to pool handlers, and drive the non-pool handlers from the market. This prohibits the flow of milk from one production area into a given marketing area. This is in violation of Section 8c(5)(G). In the case of *Bailey Farm Dairy Co. v. Anderson*, 157 F. 2d 87, the Court held that "From the language of the provision and its legislative history, the term 'prohibit' has application to both milk and milk products, but the term 'in any manner limit' has application only to milk products." *From what has gone before in this Petition, it is evident that 5 to 6c a quart penalty required to be paid by your Petitioners, over and above that required to be paid by competitors, would prohibit their participation in this marketing area where milk wholesales and retails from 24½c to 28c per quart, and the profit to all handlers or to any handler is far less than 5 to 6c a quart. The Secretary is not authorized by the statute to do by indirection what Congress did not permit him to do directly.*

III. A Constitutional Question Is Presented.

If the Opinion of the Court below is to prevail, i.e., Section (7)(D) authorizes the imposition of compensatory payments without regard to the "terms and conditions"

set out in Section 8c(5)(A), the section would then become unconstitutional. Such an interpretation would be an illegal delegation of legislative authority and a violation of Article I, Section 1 of the Federal Constitution. The *Schechter* case, *supra*, struck down the National Industrial Recovery Act as a violation of the Constitution in this respect. The statute here involved was amended to comply with the decision in the *Schechter* case. This Court has consistently held that authority delegated to an administrative or executive agency must contain standards or chart a course to be complied with or followed by the Secretary. This Court, in the *Rock Royal* case, *supra*, distinguished the present statute from the N.R.A.[11] It is the duty of the Court to give a constitutional interpretation to the statute or any section thereof, if the words of that statute or section will permit. If Section (7)(D) is to be given a constitutional interpretation, it must be interpreted as authorizing only such provisions as comply with the "terms and conditions" set out specifically in the other sections of 8c(5). The *Kass* case so interpreted the section, as did this Court in the cases of *Rock Royal* and *Brannan v. Stark, supra.*

IV. The Decision of the Court Below Is Erroneous.

For the many reasons set out in the previous topics, the decision of the Court below is erroneous, in the following respects:

1. It ignores the mandatory "terms and conditions" of Section 8c(5)(A) requiring uniformity.

2. It limits the word *handlers to pool handlers, and limits the word producers to dairy farmers shipping*

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[11] "Unlike the language of the National Industrial Recovery Act condemned in the A. L. A. Schechter Poultry Corp. Case (295 U.S. page 538, 79 L. ed. 1584, 55 S. Ct. 837, 97 A.L.R. 947), the tests here to determine the purpose and the powers dependent upon that conclusion are defined."

milk to pool handlers. This amounts to adding words to the statute that do not appear therein.

3. It gives to Section 8c(7)(D) an interpretation which renders such section unconstitutional.

4. It validates a provision of Order No. 27 which is in direct violation of Section 8c(5)(G) of the Act.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statute Involved

MILK AND ITS PRODUCTS; TERMS AND CONDITIONS OF ORDERS.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices *shall be uniform as to all handlers*, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. (Emphasis added.)

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk, produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers

of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and

security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contracts between the association and its producers; *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * * *

TERMS COMMON TO ALL ORDERS.

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * * *

(D) Incidental to, and not inconsistent with the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order."

APPENDIX B

Order Involved

Sec. 927.5 *Dairy farmer.* "Dairy farmer" means any person who produces milk.

Sec. 927.6 *Producer.* "Producer" means any dairy farmer whose milk is delivered direct from farm to a pool plant.

Sec. 927.7 *Handler.* "Handler" means (a) any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant or at a plant approved by any health authority as a source of milk for the marketing area, (b) any person who engages in the handling of milk, concentrated fluid milk, cultured or flavored milk drinks, cream, half and half, or skim milk, all or a portion of which is shipped to, or received in, the marketing area, or (c) any cooperative association of dairy farmers with respect to any milk which it causes to be delivered from dairy farmers to a pool plant of any other handler for the account of such association and for which such association receives payment.

Sec. 927.83 *Payments on milk received from dairy farmers at nonpool plants.* Payments shall be made by handlers to producers, through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section: *Provided,* That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

(a) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk, which milk or milk products meets each of the following conditions:

(1) It was derived from milk received at a nonpool plant from dairy farmers or is received at a

Appendix B—*Continued*

plant from which milk specified in Sec. 927.65 (h) (2) or (3) was received from the handler's own farm.

(2) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

(3) The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

(b) The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows:

(1) If the milk or the milk equivalent of the butterfat, or the skim milk is classified and paid for under another order issued pursuant to the act, the amount of payment on such products, except skim milk, shall be any plus amount obtained by subtracting the value of the milk or the milk equivalent of the butterfat at the class price or prices under such order from the value computed in accordance with the classification and pricing set forth in this subpart: *Provided*, That the payment shall be at the rates set forth in subparagraph (2) of this paragraph if the other order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other order. The amount of payments on skim milk shall be an amount computed pursuant to Sec. 927.44 adjusted for the location of the plant.

(2) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401-425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the differences between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the

location of the plant at which the nonpool milk was originally received from farmers: *Provided,* That for concentrated fluid milk, cream, half and half, fluid cream products, and cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be computed on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 as similarly adjusted for location.

(3) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant farther from the marketing area than the 401-425 mile zone, the handling of which is not regulated by another order issued pursuant to the act, or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payments shall be the difference between the value of its milk equivalent at the Class I-A or Class II price, depending upon its classification, and the value of such milk at the midwestern condensery price announced pursuant to Sec. 927.46 (b)(9), such class prices to be adjusted for the location of the plant at which the nonpool milk was originally received from dairy farmers: *Provided,* That for milk, fluid milk products, and cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, the payment shall be the difference between the value of such milk or milk product at the Class I-A price for milk containing 3.5 percent butterfat, adjusted for location of the plant, and the condensery price. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 similarly adjusted for location.

(4) For any month in which the volume of milk subject to the butter-cheese adjustment used in the computation of the uniform price is more than 15 percent of the combined volume of the Class I A and Class II milk used in such computation, the payment required by subparagraph (2) of this paragraph

shall be increased by the value of the milk or milk equivalent at the rate of the butter-cheese adjustment at the plant where the milk was received from dairy farmers.

(5) In computing the milk equivalent value of milk or milk products as specified in this paragraph, such value shall be computed on the basis of milk containing 3.5 percent of butterfat.

(c) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph: *Provided,* That if the milk is received from a handler under another order issued pursuant to the act, which order provides that the payment to the producer settlement fund may be deducted from the handler's obligation under the other order, the payment shall be made by the handler subject to the other order regardless of the provisions of subparagraphs (1) through (3) of this paragraph:

(1) By the handler first receiving the milk or milk product at a pool plant outside the marketing area.

(2) By the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area.

(3) By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

(d) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to Sec. 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with Sec. 927.80.

Sec. 927.84 *Payments on milk or milk products the source of which is not established.* Payments shall be made by handlers to producers through the producer settlement

Appendix B—*Continued*

fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section.

(a) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk which milk or milk product meets each of the conditions specified in subparagraphs (1) and (2) and, if applicable, subparagraph (3) of this paragraph:

(1) It was derived from milk for which the farm source is not established.

(2) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant.

(3) If first found at a nonpool plant, the milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk is subject to the fluid skim differential.

(b) The amounts of payment for the product set forth in paragraph (a) of this section shall be as follows:

(1) For milk, concentrated fluid milk, fluid milk products, or cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, the value of such milk, fluid milk products, cultured or flavored milk drinks, or the milk equivalent of such concentrated fluid milk at the class price at the plant where first found.

(2) For cream, half and half, fluid cream products, or cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent of butterfat, the value of the milk equivalent of such product at a rate per hundredweight computed pursuant to Sec. 927.40 (d)(1) adjusted by the differentials set forth in column C in the table in Sec. 927.42 for the zone of the plant at which first found.

(3) For skim milk in a form subject to the fluid skim milk differential, the value at a rate per hundredweight computed as follows: divide the amount computed pursuant to Sec. 927.40 (d)(2) by 0.9125. add an amount computed pursuant to Sec. 927.44,

Appendix B—*Continued*

and adjust the result by the differential set forth in column B in the table in Sec. 927.42 for the zone of the plant where first found.

(4) For skim milk in a form not subject to the fluid skim milk differential, the value at a rate per hundredweight computed as follows: divide the amount computed pursuant to Sec. 927.40 (d)(2) by 0.9125.

(5) In computing the milk equivalent value of products as specified in this paragraph, such value shall be computed on the basis of milk containing 3.5 percent of butterfat.

(c) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph.

(1) By the handler first receiving the milk or milk product at a pool plant outside the marketing area.

(2) By the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area.

(3) By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

(d) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to Sec. 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with Sec. 927.80.

APPENDIX C

Opinion of the United States Court of Appeals for the Third Circuit

(Filed February 20, 1961)

By McLaughlin, *Circuit Judge.*

The prime issue presented by these appeals is whether certain provisions of New York-New Jersey Milk Marketing Order, 7 C.F.R. § 927.1 *et seq.*, (hereinafter referred to as Order No. 27), requiring all non-pool handlers of milk, to make a "compensatory payment" to the Producers Settlement Fund for all non-pool fluid milk distributed by them in the marketing area, 7 C.F.R. §§ 927.83, 927.84, contravenes the Agricultural Adjustment Act of 1933, as amended by the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. § 601 *et seq.*

Docket No. 13,289, is an enforcement action brought by the United States pursuant to § 8a (6) of the Act, U. S. C. § 608a (6), to require Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., to make the compensatory payments required by the order. Dockets Nos. 13,290 and 13,291, are actions by the Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., respectively to obtain judicial review of decisions of the Judicial Officer in the United States Department of Agriculture pursuant to § 8c (15) of the Act, 7 U. S. C. § 608c (15) (B). The Judicial Officer held that the contested provisions for compensatory payment were valid.

In the district court, all three actions were consolidated for trial.[1] In its opinion reported in 183 F. Supp. 80 (1960),

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[1] In Docket No. 13,289, pending final outcome of the cases, the district court ordered that the compensatory payments be paid into the registry of the court, and enjoined Lehigh from further violating Order No. 27.

Appendix C—*Continued*

that court, although finding the provisions for compensatory payments supported by the record and "incidental to • • • and necessary to effectuate the other provisions of such order," invalidated them under the authority of the majority holding in Kass v. Brannan (Judge Learned Hand dissenting), 196 F.2d 791 (2 Cir. 1952).[2] The court noted however:

> "Although we are not compelled to accept that Court's decision under the concept of *stare decisis* as it applies to Federal Courts and although we might have reached a contrary result if initially called upon to interpret § 608c (5), we do not feel justified in now rejecting the interpretation there placed upon § 608c (5) (A) and upon the earlier version of Order No. 27. That Court's opinion is always entitled to great weight."

The primary policy of Congress in enacting the Federal Milk Control program and particularly Order No. 27, applicable in the case at bar,[3] was "• • • to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices • • •." 7 U. S. C. § 602 (1) (1952). Regarding milk, the plight of the farmers (referred to as producers in the milk industry) was caused by the fierce competition to procure the most lucrative market for it. Since fluid milk brought the highest

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[2] Specifically the district court stated:

> "• • • in light of the Kass v. Brannan decision, *supra*, the Order as promulgated did not comply with Section 608c (5) (A) of the Agricultural Marketing Agreement Act, 7 U.S.C.A., in that the prices were not uniform as to *all* handlers and in particular as to these two plaintiff handlers. Therefore, that part of the Order requiring compensatory payments to the Producers Settlement Fund by them must be stricken down."

[3] For a more detailed discussion of the Order and the problems of the milk industry, see Nebbia v. New York, 291 U. S. 502 (1934); United States v. Rock-Royal Co-op., 307 U. S. 533 (1933).

Appendix C—*Continued*

return to the producer and cream or milk product utilization was less rewarding, the rivalry was for that market. To alleviate the harsh effects of that struggle on producers, Congress enacted the governing law vesting the Secretary of Agriculture with broad regulatory powers. Pursuant to the statutory authorization, the Secretary of Agriculture has promulgated regional milk orders based on a system of milk pooling. Those orders, with their programs of classification and reporting are geared to provide the producer in the specified marketing area with a uniform price for all milk delivered by him for processing, irrespective of the particular use to which it is ultimately put.

This is accomplished by the following method. Under Order No. 27 milk utilization is classified into three fundamental groups: Class I (fluid milk); Class II (cream); Class III (milk products, butter, cheese, etc. * * *). The Market Administrator fixes a price for each class. He then determines from reports filed by the handlers the volume of milk used in each classification throughout the marketing area. From those figures, the Administrator computes the value of all milk used in the Marketing Area by multiplying the market volume figure in each class by the class price. After adding the totals and making certain additions and/or subtractions not relevant here, he divides that figure by the aggregate volume of milk of all classifications used in the Marketing Area, to determine the uniform blend price which is paid to all producers, regardless of the utilization of their milk. Since each handler's use of the milk received from producers would not average out to the uniform blend price, a Producers Settlement Fund was created. This fund is contributed to by those handlers whose total class utilization price of the milk exceeds the uniform blend price and is drawn upon by those handlers whose total class utilization price of the milk is less than the uniform blend price. Thus although the producer receives the uniform blend price regardless of the utilization

of his milk, the handler must account to all other handlers through the Producers Settlement Fund for the price of his actual use of the milk purchased by him.

Lehigh and Suncrest are not fully regulated handlers, the largest part of their milk business being outside the marketing area. However, since a certain percentage of their outlets for milk (approximately 5%) are in the marketing area, they are subject to the compensatory payment provisions of Order No. 27, 7 C. F. R. §§ 927.83, 927.84, which provide that where a non-pool handler distributes milk for Class I utilization in the marketing area, he must pay into the Producers Settlement Fund a compensatory payment measured by the difference between the Class I and Class III price.

Lehigh and Suncrest attacked this provision and were sustained by the district court on the authority of Kass v. Brannan, *supra*. That case held that mandatory compensatory payments imposed upon non-pool handlers for fluid milk distributed in the marketing area were, "* * * inconsistent with the terms and conditions specified in section 8c (5) (A) * * *." That section reads as follows:

"Milk and its products; terms and conditions of orders.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk pur-

> chased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

To reach its conclusion, the court in Kass compared the cost of the milk to pool handlers with that of non-pool handlers. It stated that although the cost to a pool handler is the class price, a non-pool handler's cost is composed of two items, the amount it pays the seller and the amount of the compensatory payment. The court decided that since the payment is based on the difference between two class prices without taking into account the initial cost to the handler, the result is a disparity between the non-pool handler's total cost and the pool handler's total cost which violates the uniformity provision of Section 8c (5) (A) of the Act. We cannot agree with the holding.[4]

The *Kass* opinion assumes that the minimum class price provision of Section 8c (5) (A) is designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. And Lehigh and Suncrest assert in their brief:

> "The result sought to be achieved by Congress in this section [8c (5) (A)] was that through the device of class prices *all handlers' costs for milk utilized in the marketing area should be uniform* so that no one group of handlers could enjoy an unfair advantage or suffer an unfair disadvantage." (Emphasis supplied).

This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress.

Section 8c (5) (A) of the Act makes no reference to equalizing either fully regulated or partially regulated

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[4] We note that a recent case in the District Court of Connecticut, Knudsen Brothers Dairy, Inc. v. Benson, Civil No. 8145 (D.C. Conn. July 19, 1960), followed the mandate of its circuit as set forth in the *Kass* opinion. As it adds nothing to the conclusion in Kass it will not be discussed.

handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. Nor does it take account of the initial cost of milk to handlers. As has been recognized by the Supreme Court, Section 8c (5) (A) does not prevent the pool-handler from paying a premium to producers for milk over and above the uniform blend price. However, his accountability to the Producers Settlement Fund would still be measured by the use class prices fixed by the Market Administrator under Section 8c (5) (A). Stark v. Wickard, 321 U. S. 288, 303 (1944). These latter prices are based on the use value of the milk. Neither fully regulated nor partially regulated handlers' initial costs are involved. Lawson Milk Company v. Benson, 187 F.Supp. 66, 73 (N.D.Ohio 1960).

Moreover to *imply* the thought urged by Lehigh and Suncrest as the motivation behind Section 8c (5) (A) and thereby measure the compensatory payment by using the *Kass* formula of equalized actual costs, would be repugnant to the *express* purpose set forth in the Act itself, i.e., regional regulation to secure a stable market and parity prices for producers. To illustrate: If a non-pool handler's initial cost was the Class I (fluid milk) price, he could, under the principle of the *Kass* case, distribute milk in the marketing area in any volume without accounting to the Producers Settlement Fund or making a compensatory payment. If his initial cost was greater than the Class I (fluid milk) price, the same result would occur. If his initial cost was slightly less, his compensatory payment would be a token one.

It is evident that in all three illustrations, employment of the *Kass* theory to measure compensatory payments would impair the integrity of the regional marketing scheme, since the compensatory payments would bear no relation to the loss of the Class I fluid milk utilization in the marketing area. In contradistinction, the payments

provided for in Order No. 27, complement the regional marketing idea. They are designed to compensate the pool for the loss of the Class I fluid milk utilization and they in turn protect the uniform blend price in the marketing area. We cannot, as urged by Lehigh and Suncrest, reasonably impute to Congress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress.[5]

We are also convinced that, in the light of the structure and avowed purpose of the Act, Section 8c (5) (A), has no application to non-pool handlers. Lehigh and Suncrest would have it that the Act makes no distinction between pool and non-pool handlers and that therefore the provision of Section 8c (5) (A) which states: "Such price shall be uniform as to all handlers," guarantees them a cost equal to that of pool handlers.[6] But there is not the slightest

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[5] Examination of the *Kass* opinion on its own facts reveals that Kass was a *handler* who purchased cream and condensed milk from another handler. Pursuant to Section 927.9(h) of Order No. 27, Kass was charged compensatory payments on the cream measured by the difference between the Class II-A and Class IV-A price and on the condensed milk measured by the difference between the Class II-B and Class IV-A price. Clearly Section 8c (5) (A) has no application in such a situation. It only contemplates minimum class prices which *handlers* shall account to the pool for on milk purchased from *producers*. It makes no reference to situations where *handlers* purchase milk from other *handlers*. Even if it could be said that it was designed to limit the imposition of compensatory payments at all, and we hold that it was not, it would be applicable solely to handler-producer transactions, and not to handler-handler transactions. Lawson Milk Company v. Benson, 187 F.Supp. 66, 70-71 (N.D.Ohio 1960); see also, dissenting opinion of Judge Learned Hand in Kass v. Brannan, 196 F.2d at 799.

[6] As a matter of statutory construction if we were to adopt the theory of Lehigh and Suncrest and thereby include non-pool producers within the ambit of the term "producers" in Section 8c (5) (A), the provisions of the next section, 8c (5) (B), which requires payment of the uniform blend price to "producers", would

indication that Congress used the language of Section 8c (5) (A), with the thought of providing for equalized costs between pool and non-pool handlers and thereby stifling the effectiveness of the whole plan. "An elaborate enactment like this, devised by those who know the needs of the industry and drafted by legislative specialists, is to be treated as an organism. Every part must be related to the scheme as a whole."[7] This was acknowledged early in the history of the Act by the Supreme Court when it held that agency cooperatives were subject to the Act even though they did not technically purchase the milk of their producers. United States v. Rock Royal Co-op., 307 U. S. 533 (1938). See also Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87, 95 (8 Cir. 1946).

The Act does not attempt nation-wide regulation, but rather "• • • authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable." United States v. Rock Royal Co-op., *supra* at 576. "The Act recognizes that the factors which affect the problem vary in different production and marketing areas and that the question therefore is one that must be dealt with regionally on the basis of the particular conditions." Bailey Farm Dairy Co. v. Anderson, *supra* at 90. This establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers. The Secretary of Agriculture following the

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also be applicable to Lehigh and Suncrest. In effect, the Market Administrator would have the choice of either imposing full regulation on Lehigh and Suncrest or no regulation at all. So limiting the discretion of the Market Administrator is inconsistent with the tenor of the entire act and contrary to the accepted judicial interpretation of its terms. See, e.g., Queensboro Farms Products v. Wickard, 137 F.2d 969, 977 (2 Cir. 1943); Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87, 94-95 (8 Cir. 1946).

[7] Frankfurter, J., in Stark v. Wickard, 321 U. S. 288, 311, 315 (1944) (dissenting opinion).

Appendix C—*Continued*

letter and spirit of the statute has implemented this concept. He has conducted hearings and investigations to determine the need in certain regions for Milk Marketing Orders, and where called for has promulgated them. The pool handlers under those Orders are subject to full regulation. They must report to the Market Administrator in the region, must pay the uniform blend-price to producers and must account to the Producers Settlement Fund for their actual utilization of the Milk. The non-pool handlers are not subject to full regulation, are not required to pay the uniform blend price to their producers and do not have to account to the Producers Settlement Fund for their utilization of the Milk. Absent the compensatory payments, they are unfettered as to price, market and amount of distribution.[8]

The aim of Section 8c (5) (A) in this control pattern is certain. It provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c (5) (B), they pay the producer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and non-pool handlers. This provision, coupled with the Producers Settlement Fund provides part of the mechanism to achieve the ultimate goal of the Act, stabilizing the producers market on the regional level. Consonant with that salutary, carefully wrought design, its only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

The final contentions of Lehigh and Suncrest are that the provisions for compensatory payments are not allowed

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[8] Although admittedly Lehigh Valley Cooperative Farmers, Inc., is subject to another milk order, as we view Section 8c (5) (A) that has no bearing on its position concerning sales in the Order No. 27 area.

by the Act and not supported by the record. As we have stated previously, the district court found the provisions "incidental to • • • and necessary to effectuate the other provisions of such order" under Section 8c (7) (D) of the Act and also found the provisions supported by the record. We agree with the district court's conclusion, 183 F.Supp. at pp. 89, 90. See also Lawson Milk Company v. Benson, *supra*, at pp. 72, 73.

The judgment of the district court will be reversed and the proceedings remanded to that court with instructions (1) to affirm the ruling and decision of the Judicial Officer in Lehigh Valley Cooperative Farmers, Inc. v. Benson, No. 13,290, and Suncrest Farms, Inc. v. Benson, No. 13,291; and (2) to issue an injunction as prayed for in the complaint in United States v. Lehigh Valley Cooperative Farmers, Inc., *et al.*, No. 13,289 to require the appellees to comply with the terms of §§ 927.29(d) and 927.83 of the New York-New Jersey Milk Marketing Order for the payment of compensatory payments and to pay to the Market Administrator the money in the registry of the district court in this proceeding.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,289

UNITED STATES OF AMERICA,
Appellant,

vs.

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, HASTIE AND FORMAN,
Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause remanded with instructions to issue an injunction as prayed for in the complaint to require the defendants to comply with the terms of 927.29 (d) and 927.83 of the New York-New Jersey Milk Marketing Order for the payment of compensatory payments and to pay the Market Administrator the money in the registry of the District Court in this proceeding.

Attest:

IDA O. CRESKOFF
Clerk

February 20, 1961

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,290

LEHIGH VALLEY COOPERATIVE FARMERS

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, HASTIE AND FORMAN,
Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the proceedings remanded with instructions to affirm the ruling and decision of the Judicial Officer.

Attest:

IDA O. CRESKOFF
Clerk

February 20, 1961

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,291

SUNCREST FARMS, INC.

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, HASTIE AND FORMAN,

Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the proceedings remanded with instructions to affirm the ruling and decision of the Judicial Officer.

Attest:

IDA O. CRESKOFF

Clerk

February 20, 1961

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,289

UNITED STATES OF AMERICA,
Appellant

vs.

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC.

No. 13,290

LEHIGH VALLEY COOPERATIVE FARMERS

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America,
Appellant

No. 13,291

SUNCREST FARMS, INC.

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America,
Appellant

Pursuant to Rule 36 (2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until April 14, 1961.

Dated: March 15, 1961

McLAUGHLIN
Circuit Judge